



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re

VICKIE LYNN MARSHALL,

Debtor.

E. Pierce Marshall,

Plaintiff,

vs.

Vickie Lynn Marshall,

Defendant,

and related counterclaim.

Case No. LA 96-12510-SB

Adv. No.: LA 96-01838-SB

Chapter 11

**First Amended Opinion
on Application of
Bankruptcy Discharge**

DATE: February 21, 2002
TIME: 11:00 a.m.
CTRM: 1575

FOR PUBLIC TION

I. Introduction

This proceeding on remand from the district court concerns the applicability of the debtor's discharge under a chapter 11¹ plan to post-discharge attorneys' fees awarded in a related Texas probate case. The court finds that the attorneys' fees and costs awarded by the Texas court have been discharged because they are rooted in pre-discharge (and indeed prepetition) events, even though the fees and costs were incurred after the debtor's discharge was granted. In addition, the court finds that judicial estoppel prohibits the claim for costs and attorneys' fees. In consequence, the attorneys' fees and costs are discharged.

II. Facts

A. Background

Debtor Vickie Lynn Marshall (Vickie)² is the surviving widow of J. Howard Marshall II (J. Howard), who died on August 4, 1995. J. Howard married Vickie (also known as Anna Nicole Smith) on June 27, 1994 after two and a half years of courtship. At the time of their marriage, Vickie was 26 years old and J. Howard was 89 years old.

Vickie is a figure of some notoriety because of her career as a model and actress.³ J. Howard was also a figure of some notoriety in his own right and was said to be either the richest or second-richest man in Texas at the time of his death. The exact amount of his wealth at the time of his death is disputed, but estimates put it at as high as \$2 billion.

It is undisputed that J. Howard lavished

great sums of money on Vickie during their courtship and marriage. Nonetheless, he did not explicitly provide for Vickie in his will. According to Vickie, however, J. Howard had promised her that she would receive substantial wealth and be taken care of after his death. Pierce Marshall (Pierce), J. Howard's adult son from a former marriage, contests whether J. Howard ever made such a promise.

The magnitude of the sums of money involved in J. Howard's estate has sparked intensely contested litigation on several fronts. On January 25, 1996, a few months after J. Howard's death, Vickie filed her chapter 11 bankruptcy in this court.⁴

In an adversary proceeding responding to a claim filed by Pierce,⁵ Vickie contended that Pierce tortiously interfered with her expected *inter vivos* gift from her late husband.⁶ Vickie's counterclaims against Pierce went to trial in this court in the fall of 1999. On October 6, 2000 this court issued an Amended Memorandum of Decision Following Trial ("Amended Decision"), *Marshall v. Marshall (In re Marshall)*, 253 B.R. 550 (Bankr. C.D. Cal. 2000). Based in large part on facts found against Pierce as sanctions for his discovery abuses, the court concluded that Pierce tortiously interfered with Vickie's expectations of an *inter vivos* gift and awarded \$449,754,134 in compensatory damages. Subsequently, this court also awarded \$25 million in punitive damages and issued a judgment.

Pierce appealed the bankruptcy court's judgment to the district court. On June 19, 2001 that court entered an Amended Order

⁴Apparently the precipitating event for Vickie's bankruptcy filing was her suffering a default judgment of more than \$700,000 in Los Angeles County Superior Court in a case brought by her former housekeeper for sexual harassment.

⁵An objection to a creditor's claim that joins a demand for relief of the kind specified in Rule 7001 becomes an adversary proceeding. See Rule 3007.

⁶Vickie filed a similar claim in the Texas probate case, where she contended that Pierce interfered both with the prospective *inter vivos* gift and with a prospective inheritance.

¹Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (West 2001) and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

²Because all the principals in this adversary proceeding share the same last name, the court will refer to them by their given names, as is customary in cases involving family matters.

³Prior to their marriage, J. Howard had assisted in developing her career.

1 Regarding Subject Matter Jurisdiction, *Marshall*
2 *v. Marshall (In re Marshall)*, 264 B.R. 609 (C.D.
3 Cal. 2001), in which it reversed on constitutional
4 grounds this court's ruling that the adversary
5 proceeding was a core matter pursuant to 28
6 U.S.C. § 157(c)(1) (West 2001). *De novo*
7 review of this court's findings in the adversary
8 proceeding is pending in the district court.

9 **B. The Discharge Order**

10 On March 25, 1999 this court entered
11 its discharge order,⁷ effective March 8, 1999
12 (the date of the entry of the order confirming
13 Vickie's plan of reorganization), which stated:

14 Debtor is hereby discharged
15 from all claims that arose
16 before the date of this Order . .
17 . whether or not: (a) a proof of
18 claim was filed . . . or (c) the
19 holder of the claim has
20 accepted the plan.

21 The order further stated:

22 Any judgment . . . hereafter
23 obtained in any court other
24 than this court is null and void
25 as a determination of the
26 personal liability of the debtor
27 with respect to any debts
28 discharged under 11 U.S.C.
1141 All creditors whose
debts are discharged by this
order and all creditors whose
judgments are declared null
and void by this order are
enjoined from instituting or
continuing any action or
employing any process or
engaging in any act to collect
such debts as personal
liabilities of the debtor.

In addition, Article IX of the plan of
reorganization specifically reserved the

⁷Pursuant to the discharge order, all of
Vickie's prepetition debts were discharged
except for a pending non-dischargeability
claim that Pierce had brought for defamation.
The court later granted summary judgment to
Vickie on this issue, which made the
discharge complete.

jurisdiction of this court "to protect the assets of
. . . the Reorganized Debtor from creditor
actions which the Plan and Order of
Confirmation disallow or affect"

C. The Texas Litigation

J. Howard's estate remains in probate
in Texas ("the Texas litigation").⁸ While the
adversary proceeding in this court was pending,
Vickie filed a backup claim on January 23, 1998
in the Texas litigation.

Vickie dismissed her claims in the
Texas litigation a few days after this court
issued judgment in her favor. Nonetheless,
Pierce thereafter amended his operative
pleadings in that case on February 9, 2001 to
pursue additional claims against Vickie.

The Texas litigation was tried to a jury
from September 18, 2000 to February 19, 2001.
The judge in that trial submitted 87 questions to
the jury. The only question involving Vickie was
Question 66, which stated: "Do you find that
Vickie Lynn Marshall did not have an agreement
with J. Howard Marshall, II, that he would give
her one-half of all of his property?" The jury
found that there was no such contract, and
Vickie has never contended that there was.⁹

Judgment after a jury trial was entered
in the Texas litigation on August 15, 2001. The
Texas probate court awarded Pierce \$541,000
against Vickie in fees and expenses. In
addition, that court awarded court costs and
interest, the amount which apparently remain
undetermined. The fees awarded to Pierce
were based entirely on Pierce's legal expenses
for the trial of the Texas litigation, which took
place after the discharge was entered in this
chapter 11 case.

After oral argument on the motion
before this court, Pierce went back to the Texas

⁸Shortly after J. Howard's death, probate
proceedings were initiated in Louisiana, but
were dismissed when the Louisiana Supreme
Court found that the Louisiana courts lacked
jurisdiction.

⁹The litigation in this court has proceeded from
the outset on the theory that J. Howard had
made a promise of a gift to Vickie, not a
contract. The only confusion on this issue has
been whether the promised gift was to be
testamentary or *inter vivos*.

1 probate court on October 25, 2001 and obtained
2 a modification of that court's judgment which
3 states in part, "the Court finds that all decrees
4 pertaining to [Vickie] as ordered herein do not
5 arise from any conduct that occurred on or
6 before March 8, 1999."¹⁰

7 **D. Contempt Proceedings in this Court**

8 On several occasions Vickie has
9 brought motions requesting that this court find
10 Pierce in contempt of the discharge order for
11 pursuing claims against her in the Texas
12 litigation. Vickie brought her first emergency
13 contempt application in response to Pierce's
14 February 9, 2001 amendments in the Texas
15 litigation, and the court set a hearing on
16 February 14, 2001. After the hearing this court
17 issued a written order that required Pierce to
18 remove all pre-discharge claims against Vickie
19 in the Texas litigation, and reserved decision on
20 the remainder of the contentions. In a
21 subsequent hearing on March 7, 2001, this
22 court orally ordered Pierce's counsel not to
23 proceed in the Texas probate court on Question
24 66.

25 Pursuant to a further contempt
26 application, on March 16, 2001 this court issued
27 a further order to show cause that was set for
28 hearing on March 21, 2001. The court's order
on that hearing, issued on April 20, 2001,
enjoined Pierce from:

pursuing or seeking, directly or
indirectly, any award, judgment
or determination of any claims
or allegations previously
determined or that could have
been determined by this Court
in its Prior Decisions and
Judgment, including without
limitation pursuing Question
No 66 in the Texas action

29 The court further ordered that Pierce
30 immediately dismiss any claims seeking any
31 such relief.

32 After further contempt proceedings on
33 May 15, 2001, this court issued an order dated
34 May 16, 2001 that permitted Pierce to proceed
35 with the contract issue in the Texas trial on two
36 grounds: Vickie had never contended that she

37 ¹⁰The judgment in the Texas litigation was
38 further modified on December 7, 2001 in
respects not material to this case.

had a contract with her husband to receive part
of his property, and Pierce promised and
represented to this court that he would use any
judgment of the Texas court solely for setoff
purposes.

The district court has reversed this
court's orders of February 14, 2001 and April
20, 2001 and remanded them for
reconsideration in light of this court's May 16,
2001 order and in light of the district court's
vacating this court's judgment in the adversary
proceeding. The district court further stated that
this court should consider whether it was
procedurally proper to issue an injunction in the
adversary proceeding, where the injunction was
solely based on Vickie's discharge.

III. Contentions of the Parties

Pierce argues that the attorneys' fees
and costs awarded against Vickie in the Texas
litigation arose entirely after the discharge was
granted in this case, and that in consequence
they are not affected by the discharge. Vickie
argues that the claim that formed the basis for
these fees arose prepetition, and that any
liability on her part arising therefrom was
discharged by the chapter 11 discharge.

IV. Analysis

The Congressional grant of bankruptcy
jurisdiction includes the power to determine the
scope of the discharge that Vickie received in
this case. The parties do not contest that this is
a core proceeding.

A. Scope of the Discharge Injunction

The filing of a bankruptcy case
immediately imposes an automatic stay on
virtually all creditor collection activities against
the debtor. See § 362. This automatic stay
does not last indefinitely: it terminates when a
discharge is granted or denied. See §
362(c)(2)(C).¹¹ In this case the discharge was

¹¹In addition, the automatic stay terminates as
to an act against property of the estate when
the property exits from the estate, such as by
sale or foreclosure. See § 362(c)(1). If none
of these events occurs, the automatic stay
terminates when the case is dismissed or
closed, whichever happens first. See §
362(c)(2).

1 granted effective March 9, 1998.

2 Upon the grant of a discharge in a
3 chapter 11 case, the automatic stay is replaced
4 with the discharge injunction provided by §
5 1141(d)(1), which provides in relevant part:

6 Except as otherwise provided
7 in this subsection, in the plan,
8 or in the order confirming the
9 plan, the confirmation of a
10 plan—

11 (A) discharges the debtor
12 from any debt that arose
13 before the date of such
14 confirmation, and any debt of a
15 kind specified in section
16 502(g), 502(h), or 502(i) of this
17 title, whether or not—

18 (i) a proof of the claim based
19 on such debt is filed or
20 deemed filed under section
21 501 of this title;

22 (ii) such claim is allowed
23 under section 502 of this title;
24 or

25 (iii) the holder of such claim
26 has accepted the plan

27 The discharge injunction is permanent.
28 It survives the bankruptcy case, and applies
forever with respect to each discharged debt.
Again, the Senate Report explains the impact of
the injunction:

The injunction is to give
complete effect to the
discharge and to eliminate any
doubt concerning the effect of
the discharge as a total
prohibition on debt collection
efforts. This paragraph . . .
cover[s] any act to collect,
such as dunning by telephone
or letter, or indirectly through
friends, relatives, or
employers, harassment,
threats of repossession and
the like.

S. REP. NO. 95-989, at 182-83 (1979). The
permanency of the discharge injunction
contrasts with the temporary character of the
automatic stay.

The basic policy of the discharge
injunction is to excuse a debtor from any

obligation whatever to go to court to defend
against a discharged debt. In this respect the
discharge injunction is different from a simple
discharge of indebtedness, and like the
automatic stay. A simple discharge would
function as a defense to any action to collect a
discharged debt, but it would have to be invoked
in defense to litigation. The discharge injunction
goes much further: it excuses the debtor from
appearing to defend, it enjoins all discharged
creditors from bringing or continuing any action
with respect to a discharged debt, and it renders
void any judgment granted by another court in
violation of the discharge. The legislative
history states:

The injunction is to give
complete effect to the
discharge and to eliminate any
doubt concerning the effect of
the discharge as a total
prohibition on debt collection
efforts. . . The change . . . is
intended to insure that once a
debt is discharged, the debtor
will not be pressured in any
way to repay it. In effect, the
discharge extinguishes the
debt, and creditors may not
attempt to avoid that.

S. Rep. No. 95-989, at 80 (1978).

B. Application to this Case

Under Ninth Circuit case law, "a claim
arises, for the purposes of discharge in
bankruptcy, at the time of the events giving rise
to the claim, not at the time plaintiff is first able
to file suit on the claim." *O'Loughlin v. County of
Orange*, 229 F.3d 871, 874 (9th Cir. 2000). This
rule is subject to two exceptions recognized in
Ninth Circuit case law. *See id.* at 873-76.

The first exception applies where post-
discharge conduct is so related that the pre- and
post-discharge conduct is a "continuing
violation." *Id.* at 876. When this occurs,
damages based on conduct after the date of the
discharge are not discharged, but pre-discharge
damages are discharged. *See id.* The
consequence of the "continuing violation"
doctrine is that the debtor cannot avoid liability
for post-discharge conduct. The rationale is that
a debtor should not be permitted to use pre-
discharge misconduct to avoid liability for similar

1 post-discharge conduct. *See id.* at 875. Pierce
2 does not contend that this exception applies in
3 this case.

4 The second exception, on which Pierce
5 relies, applies where the post-discharge conduct
6 is "sufficiently independent" of pre-discharge
7 conduct that it separately supports a post-
8 discharge debt. Independent conduct by a
9 debtor after the discharge may give rise to a
10 debt that is not subject to the bankruptcy
11 discharge. *See id.* at 876.

12 The application of the discharge
13 injunction in this case turns on what is the
14 "claim" at issue. Pierce contends that his claim
15 arose after the discharge, when he incurred the
16 attorneys' fees at issue. Pierce claims that
17 Vickie's wrong consists in her refusal to
18 relinquish her claim to probate assets of her
19 deceased husband J. Howard, which required
20 Pierce to obtain a declaratory judgment that she
21 had no such entitlement.

22 The court finds that this case is
23 governed by two contrary Ninth Circuit decisions
24 interpreting the second exception, in both of
25 which the Ninth Circuit found that the attorneys'
26 fees at issue were prepetition debts.

27 *Kadjevich v. Kadjevich* (*In re*
28 *Kadjevich*), 220 F.3d 1016 (9th Cir. 2000),
involved a state court prepetition action for
fraudulent breach of a settlement of a partition
action arising out of joint ownership of several
industrial properties. Postpetition the parties
settled again, and again the debtor breached
the settlement agreement. The state court
thereafter awarded judgment on the underlying
fraud action, and awarded \$150,000 in
attorneys' fees and costs (under California Civil
Code § 128.5) for bad faith breach of the
postpetition settlement.

The Ninth Circuit in *Kadjevich* found
that the source of the attorneys' fees award was
the fraud action that was commenced
prepetition in state court, which gave rise to the
fee shifting award under § 128.5. *Kadjevich*,
220 F.3d at 1020. The Ninth Circuit ruled that
the judgment was unitary, and that all of it must
be considered prepetition. *See id.*

In deciding *Kadjevich*, the Ninth Circuit
relied in substantial degree on *Abercrombie v.*
Hayden Corp. (*In re Abercrombie*), 139 F.3d
755 (9th Cir. 1998), where the Ninth Circuit
found that postpetition costs and expenses,
including attorneys' fees, arising out of a
prepetition contract are prepetition unsecured
claims. *Accord, In re MTC Telemanagement*

Corp., 269 B.R. 44 (Bankr. N.D. Cal. 2001)
(following *Abercrombie*). The court in *Kadjevich*
found no principled basis to distinguish an
attorneys' fees claim based on a prepetition tort
from a similar claim based on a prepetition
contract. *See Kadjevich*, 220 F.3d at 1020.

In *Abercrombie* the debtor had
prevailed in state court on a real estate contract
claim prior to the filing of his chapter 11
bankruptcy case. After filing his bankruptcy
case, the debtor's state court judgment was
reversed by the Oregon Supreme Court. The
defendant thereafter sought to have the
postpetition attorneys' fees paid as an
administrative claim. The Ninth Circuit found
that the fees could not be treated as a
postpetition debt because the underlying claim
did not arise out of a postpetition transaction.
Abercrombie, 139 F.3d at 758.

As in this case, the defendant in
Abercrombie argued that the defense of the
appeal was postpetition conduct that qualified
the debt as a postpetition debt. The defendant
also argued that it was injured by the debtor's
postpetition decision to continue defending the
trial court judgment rather than conceding its
invalidity in the Oregon Supreme Court. The
Ninth Circuit rejected both of these arguments.
See id. at 758; *accord, In re Hemingway*
Transp., 954 F.2d 1 (1st Cir. 1992).

In contrast to this case, *O'Loughlin*
illustrates the kind of conduct that is sufficiently
independent to avoid the bankruptcy discharge.
The plaintiff in that case, a psychiatric
emergency nurse, alleged that her employer,
the County of Orange, refused on three different
occasions to accommodate her disability
resulting from repeated on-the-job injuries to her
arm. The Ninth Circuit found that Orange
County's chapter 9 discharge (which is the
same as the chapter 11 discharge in all relevant
respects) barred her first two claims, one of
which arose before the county's bankruptcy
filing and the second of which arose before the
discharge. *O'Loughlin v. County of Orange*, 229
F.3d 871, 874 (9th Cir. 2000). However, the
circuit court found that the third refusal, after the
bankruptcy discharge, was a separate violation
that was sufficiently independent of the other
wrongful acts to support an undischarged claim.
See id. at 874-75.

In this case there is no such post-
discharge conduct by Vickie to provide a basis
for an independent post-discharge claim that
can support the award of attorneys' fees and

1 costs in the Texas litigation. Vickie's claim in
2 the Texas litigation was rooted exclusively in
3 events that occurred during J. Howard's lifetime,
4 long before Vickie's bankruptcy discharge. The
5 only conduct that she carried out after her
6 discharge was to continue to press her pre-
7 discharge claim in the pending probate case
8 until January, 2001, after this court issued
9 judgment in her favor. As in *Kadjevich* and
10 *Abercrombie*, Vickie's postpetition refusal to
11 relinquish her claim in the Texas litigation is not
12 sufficiently independent of the prepetition
13 conduct giving rise to the claim to qualify for an
14 exception under the *O'Loghlin* rule.

15 There is one substantial difference
16 between this case and both *Kadjevich* and
17 *Abercrombie*. Both of those cases involved
18 claims that the attorneys' fees at issue were
19 administrative expenses, while in this case
20 Pierce contends that his award of attorneys'
21 fees is a post-discharge expense chargeable to
22 Vickie. However, the court finds that this
23 difference is irrelevant to the issue before the
24 court. The teaching of *Kadjevich* and
25 *Abercrombie* is that attorneys' fees and costs
26 arising in postpetition litigation rooted in
27 prepetition conduct must be treated as
28 prepetition debt, not postpetition debt. In
consequence, the costs and attorneys' fees
awarded against Vickie in the Texas litigation
are subject to the discharge in this case, and
are entirely void.

17 In addition, there is no independent
18 right to attorneys' fees in American law. See
19 *Alyeska Pipeline Serv. Co. v. Wilderness*
20 *Society*, 421 U.S. 240, 247, 95 S.Ct. 1612,
21 1616, 44 L.Ed.2d 141 (1977) ("In the United
22 States, the prevailing litigant is ordinarily not
23 entitled to collect a reasonable attorneys' fee
24 from the loser.") Also see *Chambers v.*
25 *NASCO, Inc.*, 501 U.S. 32, 45, 111 S.Ct. 2123,
26 2133, 115 L.Ed.2d 27 (1991) (noting three
27 exceptions to the American Rule: where a
28 party's litigation efforts directly benefit others, as
a sanction for contempt of court, and when a
party has acted in bad faith) (citing *Alyeska* at
258-59). None of these exceptions applies in
this case.

25 A claim for attorneys' fees is derivative
26 of another primary right, and arises only in
27 connection with exercising or defending that
28 right. This is true even where, as here, the right

to attorneys' fees is based on statute.¹² A claim
for attorneys' fees is part of the remedy (usually
a minor part) for the harm caused in violating
the right that gives rise to the claim. It is only
the tail of the dog, and not the dog itself. The
"dog" in this case is Vickie's claim that Pierce
wrongfully prevented her from obtaining a gift
from her husband, while he was alive, of one-
half of the community property arising during
their marriage. Pierce's alleged wrong
occurred, if at all, during the marriage and not
thereafter.

Thus the attorneys' fee award is
inextricably tied to events in 1994 and 1995. It
is entirely rooted in prepetition conduct and is
merely a postpetition consequence thereof.
Accordingly, under Ninth Circuit law, it is subject
to the discharge that Vickie received in this
case.

The discharge prohibits Pierce from
pursuing this claim against Vickie. Pursuit of
the claim in the Texas litigation is a violation of
Vickie's discharge injunction. Insofar as the
judgment in the Texas litigation awards a money
judgment against Vickie, it is a nullity and void.

C. Modification of Texas Judgment

This court does not find persuasive the
modification to the judgment that Pierce
obtained in the Texas litigation after this motion
was argued in this court. The modification
provided that the attorneys' fees awarded
therein arose entirely from Vickie's post-
discharge conduct.

Federal courts have exclusive
jurisdiction to determine whether a creditor's
actions violate the discharge injunction. The
leading Ninth Circuit case on this subject is
Gruntz v. County of Los Angeles (In re Gruntz),
202 F.3d 1074 (9th Cir. 2000), where the court

¹²The Texas statute applied by the Texas
probate court is in accord. The Texas probate
court awarded attorneys' fees pursuant to
Texas Civil Practice Remedies Code §
37.009, which provides: "In any proceeding
under this chapter [Declaratory Judgments],
the court may award cost and reasonable and
necessary attorneys' fees as are equitable
and just." In *Hitchcock Properties, Inc. v.*
Levering, 776 S.W.2d 236, 239 (Tex.App.
1989), the court affirmed that a counterclaim
brought under § 37.009 merely to make a
request for attorneys' fees is not proper.

1 found that federal courts have exclusive
2 jurisdiction to determine all bankruptcy matters.
3 See *id.* at 1080. Bankruptcy courts have the
4 power to avoid state court judgments, to modify
5 them or to discharge them. See *id.* at 1079. A
6 state court's judgment (whether or not final) that
7 falls within the federal courts' exclusive
8 jurisdiction is subject to collateral attack in the
9 federal courts. See *id.* "In short," the Ninth
10 Circuit said, "Congress intended to grant
11 comprehensive jurisdiction to the bankruptcy
12 courts so that they might deal efficiently and
13 expeditiously with all matters connected with the
14 bankruptcy estate." *Id.* (quoting *Celotex Corp.*
15 *v. Edwards*, 514 U.S. 300, 308, 115 S.Ct. 1493,
16 131 L.Ed.2d 403 (1995)).

17 Thus this court has exclusive
18 jurisdiction to determine whether Pierce's
19 actions against Vickie in the Texas litigation
20 violate the discharge injunction in this case.
21 This court also has jurisdiction to discharge the
22 judgment against Vickie in that litigation. The
23 court finds that the monetary judgment against
24 Vickie in the Texas litigation is a violation of the
25 discharge injunction and is null and void.

26 C. Judicial Estoppel

27 This court held a hearing on March 7,
28 2001 concerning Pierce's conduct in the Texas
litigation, and whether he was violating Vickie's
discharge injunction in that litigation. Pierce's
counsel represented to the court at that hearing
that Pierce would remove from the Texas
litigation all matters relating to Vickie. On April
20, 2001 this court issued an order requiring
Pierce to dismiss immediately any claim against
Vickie and "any pleading on which Question
No. 66 [the only one relating to Vickie] is based
and to desist from pursuing or seeking any
award, judgment or determination regarding
such allegations" in the Texas litigation. This
order has never been appealed or altered,
except by this court's order of May 16, 2001.

Without disclosure to this court, on April
6, 2001 Ware's law firm filed a motion for
judgment on Pierce's behalf in the Texas
litigation (which was amended on April 10,
2001). The motion for judgment was
accompanied by a proposed form of order that
included a finding on Question 66 and an award
of \$541,000 in attorneys' fees against Vickie.

At a further hearing on May 15, 2001
Pierce's attorney Lee Ware represented to this
court that "the issue insofar as compliance with

the orders of this court are concerned, is moot.
Your Honor directed Pierce Marshall . . . to
withdraw and not proceed. They have
withdrawn and are not proceeding on question
66." This representation was accompanied by
a May 14, 2001 document that allegedly was
filed in the Texas litigation, which withdrew
Question 66 from consideration by the Texas
probate court. In reliance on Ware's
representation, this court issued its May 16,
2001 order. Contrary to his representations to
this court, Pierce never withdrew the damages
request against Vickie in the Texas litigation.
The court finds that this action was directly
opposite to the representation that Pierce's
counsel made to this court.

Judicial estoppel is an equitable
doctrine that precludes a party from gaining an
advantage by asserting one position and then
later seeking an advantage by taking a clearly
inconsistent position. *Hamilton v. State Farm*
Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir.
2001); *Rissetto v. Plumbers & Steamfitters*
Local 343, 94 F.3d 597, 600-601 (9th Cir.1996);
Russell v. Rolfs, 893 F.2d 1033, 1037 (9th
Cir.1990). Ninth Circuit law invokes judicial
estoppel not only to prevent a party from gaining
an advantage by taking inconsistent positions,
but also because of "general consideration[s] of
the orderly administration of justice and regard
for the dignity of judicial proceedings," and to
"protect against a litigant playing fast and loose
with the courts." *Hamilton*, 270 F.3d at 782;
Russell, 893 F.2d at 1037.

The United States Supreme Court
recently listed three factors that courts may
consider in determining whether to apply the
doctrine of judicial estoppel:

First, a party's later position
must be "clearly inconsistent"
with its earlier position.
Second, courts regularly
inquire whether the party has
succeeded in persuading a
court to accept that party's
earlier position, so that judicial
acceptance of an inconsistent
position in a later proceeding
would create "the perception
that either the first or the
second court was misled."
Absent success in a prior
proceeding, a party's later
inconsistent position

1 introduces no risk of
2 inconsistent court
3 determinations, and thus no
4 threat to judicial integrity. A
5 third consideration is whether
6 the party seeking to assert an
7 inconsistent position would
8 derive an unfair advantage or
9 impose an unfair detriment on
10 the opposing party if not
11 estopped. In enumerating
12 these factors, we do not
13 establish inflexible
14 prerequisites or an exhaustive
15 formula for determining the
16 applicability of judicial
17 estoppel. Additional
18 considerations may inform the
19 doctrine's application in
20 specific factual contexts.

21 *New Hampshire v. Maine*, 532 U.S. 742, 121
22 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001)
23 (citations omitted).

24 The Ninth Circuit has restricted the
25 application of judicial estoppel to cases where
26 the court relied on, or "accepted," the party's
27 previous inconsistent position. See *Hamilton*,
28 270 F.3d at 783; *Interstate Fire & Casualty Co.*
v. Underwriters at Lloyd's, London, 139 F.3d
1234, 1239 (9th Cir.1998); *Masayesva v. Hale*,
118 F.3d 1371, 1382 (9th Cir.1997). The
application of judicial estoppel is not limited to
bar the assertion of inconsistent positions in the
same litigation: it is also appropriate to bar
litigants from making incompatible statements in
two different cases. See *Hamilton*, 270 F.3d at
783; *Rissetto*, 94 F.3d at 605 ("We now make it
explicit that the doctrine of judicial estoppel is
not confined to inconsistent positions taken in
the same litigation"); *Astor Chauffeured*
Limousine Co. v. Runnfeldt Investment Corp.,
910 F.2d 1540, 1548 (7th Cir.1990) (estoppel is
even more appropriate where the incompatible
statements are made in two different cases,
since "[i]nconsistent positions in different suits
are much harder to justify" than inconsistent
pleadings within one suit).

The court finds that Pierce is judicially
estopped from seeking any monetary award
against Vickie. Pierce cannot be permitted to
profit from his wrong in this matter. Insofar as
the Texas probate court decision includes a
monetary award against Vickie, it is a violation
of the representations that Pierce made to this

court, on which this court relied in permitting
Pierce to proceed in the Texas probate action.
For this additional reason the court finds that
Pierce's Texas judgment against Vickie is void
and unenforceable.

D. Issues on Remand

The foregoing analysis derives solely
from Vickie's discharge, and is based on
applicable case law thereunder. It does not
depend to any extent on this court's orders of
February 14, 2001, April 20, 2001 or May 16,
2001. These orders were issued in
implementation of the discharge injunction. The
court's decision herein also does not depend to
any extent on the court's findings and judgment
issued in the adversary proceeding, which the
district court has reversed on constitutional
grounds.

The district court has reversed and
remanded this court's February 14, 2001 and
April 20, 2001 orders to clarify the impact of its
sua sponte May 16, 2001 order on these prior
orders. The district court has also stated that
this court should consider the procedural
propriety of issuing orders implementing the
discharge injunction in the adversary
proceeding.

The May 16, 2001 order was strictly a
procedural order. It authorized the parties to
proceed in the Texas litigation, and authorized
the Texas probate court to issue a final
judgment in that proceeding. Insofar as the
prior orders prohibited Pierce from proceeding
on Question 66 in the Texas litigation, they were
vacated. As set out in detail in the May 16
order, this court granted this authorization in
reliance on Pierce's representation (which
turned out to be false) that he would use any
judgment in the Texas litigation solely for setoff
purposes. In addition, this court wanted to
authorize the Texas probate court to complete
its trial and enter judgment. This court
considered it prudent to permit the Texas
probate court to complete its lengthy trial
proceeding, which lasted some five months,
because it took that court several years and
three judges to find a window of opportunity to
conduct its trial. This court did not want to take
action that may require that court to try its case
a second time.

Notably, this court's May 16, 2001 order
did not waive or alter the discharge injunction
issued in this chapter 11 case. The May 16,

1 2001 order gave no authority to Pierce to
2 proceed to obtain a money judgment against
Vickie in the Texas litigation on any grounds.

3 This court assumed that both the
4 Texas probate court and the parties would
respect the discharge injunction issued in this
5 case. The court finds that they failed to do so.
In consequence, for the reasons stated above,
6 the discharge injunction controls the validity of
the Texas probate court judgment insofar as it
affects Vickie.

7 Like other injunctions, the normal
8 procedure to enforce a discharge injunction is
contempt. In *Walls v. Wells Fargo Bank, N.A.*,
9 276 F.3d 502 (9th Cir. 2002), for example, the
Ninth Circuit stated that contempt is the
10 appropriate remedy for a creditor's violation of
the discharge injunction. *See id.* at 507; *accord*,
11 *Henry v. Associates Home Equity Services,*
Inc., 266 B.R. 457, 477-78 (Bankr. C.D. Cal.
2001).

12 Because the discharge injunction was
13 issued in Vickie's main case, and not this
adversary proceeding, it might appear that
14 contempt proceedings should be brought in the
main case as well. Thus it might be improper to
bring contempt proceedings in the adversary
15 proceeding, as Vickie has done in this case.

16 However, where as here the
enforcement of the discharge injunction involves
17 the issuance of supplemental orders, it might be
argued that Rule 7001 of the Federal Rules of
18 Bankruptcy Procedure would require an
adversary proceeding.¹³ To forestall this
19 argument, Vickie in fact brought her contempt
proceedings in this adversary proceeding.

20 Ordinarily a new adversary proceeding
is brought in a bankruptcy case to obtain
21 injunctive relief under Rule 7001. However, an
injunction may be sought in a pending case or
22 adversary proceeding, if the injunction properly
arises out of the subject matter of the case or
23 adversary proceeding. In this case, this
adversary proceeding was already pending
24 between the same parties, and it arose out of
the same operative facts as those involved in

25
26 ¹³Rule 7001 provides in relevant part:
27 The following are adversary
28 proceedings: . . .
(7) a proceeding to obtain an
injunction . . .

the contempt proceeding.¹⁴ Thus a new
adversary proceeding was not required.

V. Conclusion

The court finds that Pierce has violated
Vickie's discharge injunction in seeking and
obtaining a money judgment against her in the
Texas litigation. That judgment, insofar as it
awards a money judgment against Vickie, is
discharged. The court further concludes that
Pierce is estopped to seek a money judgment in
the Texas litigation, or to enforce it in any
fashion, based on representations made by his
counsel in open court in this case.

Dated: February 26, 2002


Samuel L. Bufford
United States Bankruptcy Judge

¹⁴This procedure is akin to the supplemental
pleadings procedure authorized by Rule 15(d)
of the Federal Rules of Civil Procedure, which
is incorporated by reference in Rule 7015 of
the Federal Rules of Bankruptcy Procedure.
See generally, 6A Charles Alan Wright et al.,
Federal Practice and Procedure § 1504 (2d
ed. 1990).

CERTIFICATE OF MAILING

I certify that a true copy of this FIRST AMENDED OPINION ON APPLICATION
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